IN THE

Supreme Court of the United States

October Term, 1974
No. 73-1646

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY,

Petitioner,

vs.

ALFRED BEARD,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of the State of California.

Response in Opposition to Petition for Writ of Certiorari.

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SUBJECT INDEX

Page

Opinions Below 1

Statement of the Case 2

Summary of Argument 5

Argument 7

I.

The Judgment Below Was Expressly Based on Adequate, Independent State (Nonfederal) Grounds and This Court Should Therefore Deny the Petition for Certiorari 7

A. The First Ground of the Judgment Below Was Based on Principles of General Common Law Negligence, in No Manner Involving the Federal Safety Appliance Act, and Constituted an Independent, Adequate State Ground for the Judgment Herein 7

B. Even the Second Ground of the Judgment Below, That the Violation of the Fedeal Safety Appliance Act Is Evidence of Negligence, Furnishes No Basis for Certiorari Inasmuch as It (1) Is an Adequate State Ground and (2) Does Not Conflict With Federal Decisions 16

C. Petitioner Has Failed to Demonstrate, as It Must, That State Grounds Cannot Account for the Decision Herein 23

II.

Petitioner Was Remiss in Failing to Petition This Court for Certiorari After the Denial by the California Supreme Court of a Hearing After the First Beard Opinion 27

III. Page

Certiorari Should Be Denied Because of the Current Unimportance of the Opinions Herein .. 30

Conclusion 33

INDEX TO APPENDICES

Appendix A. Opinion of the Court of Appeal ..... App. p. 1

Appendix B. California Rules of Court, Rule 977 16

TABLE OF AUTHORITIES CITED

Cases	Page
Adams v. Russell, 229 U.S. 353	24
Allen v. Cal. Mutual B. & L. Assn., 22 Cal.2d 474, 139 P.2d 321	5, 28
Baird, Estate of, 193 Cal. 225	5, 28
Beard v. The Atchison, Topeka and Santa Fe Railway Company, 4 Cal.App.3d 130, 84 Cal. Rptr. 449	1, 3, 4, 8, 12, 14, 17, 21, 30
Cappa v. Oscar C. Holmes, Inc., 25 Cal.App.3d 978, 102 Cal.Rptr. 207 (1972)	18
Cooper v. Goodwin, ... F.2d .... (D.C. Cir. 1973)	32
Cramp v. Board of Public Instruction, 368 U.S. 278	7
Crane v. Cedar Rapids & I.C.R. Co., 395 U.S. 164	16, 21
DeGildo v. Caponi, 18 Ohio St.2d 125, 247 N.E. 2d 732 (1969)	33
Durley v. Mayo, 351 U.S. 277	23, 27
Ellis v. Dixon, 349 U.S. 458	24
Enterprise Irrig. Dist. v. Farmers' Mutual Canal Co., 243 U.S. 157	7
Eustis v. Bolles, 150 U.S. 361	24
Fox Film Corp. v. Muller, 296 U.S. 207	7
Georgia Power Co. v. McGruder, 229 Ga. 811, 194 S.E.2d 440 (1972)	33
Gore v. Bingaman, 20 Cal.2d 118, 124 P.2d 17	5, 27, 28
Hansen v. Kemmish, 201 Iowa 1008, 208 N.W. 277, 45 A.L.R. 498	21

Page

Lunney v. Post, 248 So.2d 504 (Fla. App.) aff'd 261 So.2d 146 (Fla.) 33

Mark v. Pacific Gas & Electric Company, 7 Cal.3d 170, 101 Cal.Rptr. 908, 496 P.2d 1276 (1972) 14, 15, 16

Mile High Fence Co. v. Radovich, 489 P.2d 308 (Colo. 1971) 32

Montega Corp. v. Grooms, 128 Ga. App. 333, 196 S.E.2d 459 (1973) 33

Moore v. Denune & Pipic, Inc., 26 Ohio St.2d 125, 269 N.E.2d 599 33

Mounsey v. Ellard, 297 N.E.2d 43 (Mass. 1973) 32

New Orleans v. New Orleans Water Works Co., 142 U.S. 79 26

O'Donnell v. Elgin, Joliet & Eastern Ry. Co., 338 70 S.Ct. 200, 94 L.Ed. 187 (1948) 21

Peterson v. Balach, 199 N.W.2d 639 (Minn. 1972) 32

Pickard v. City & County of Honolulu, 51 Hawaii 134, 452 P.2d 445 (1969) 32

Rowland v. Christian, 69 Cal.2d 108, 70 Cal.Rptr. 97, 443 P.2d 561 .....4, 14, 18, 26, 30, 32, 33

Shields v. Atlantic Coast Line R. Co., 350 U.S. 318, 76 S.Ct. 386, 100 L.Ed. 364 (1956) 22

Slick Oil Co. v. Coffey, 72 Okla. 32, 177 Pac. 915 .....19, 20

Smith v. Arbaugh's Restaurant, Inc., 469 F.2d 97 (D.C. Cir. 1972) 32

Stembridge v. George, 343 U.S. 541 25

Page

Tally v. Ganahl, 151 Cal. 418 .....5, 27

Toole v. Levitt, 492 S.W.2d 230 (Tenn. App. 1972) 33

Wells v. Goforth, 443 S.W.2d 155 (Mo. 1969) .. 33

Werth v. Ashley Realty Co., 199 N.W.2d 899 (N.D. 1972) 32

Williams v. Kaiser, 323 U.S. 471 24

Woods v. Nierstheimer, 328 U.S. 211 24

Rules

California Rules of Court, Rule 977 31

United States Supreme Court Rules, Rule 23(i) .. 2

Statute

Civil Code, Sec. 1714.7 31

Textbooks

Stern & Gressman, Supreme Court Practice, 4th Ed., pp. 134-135 .....25, 26, 27

Stern & Gressman, Supreme Court Practice, 4th Ed., pp. 167-168 .....30, 31

Stern & Gressman, Supreme Court Practice, 4th Ed., pp. 180-181 .....28, 29

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Opinions Below.

Petitioner seeks a writ of certiorari from this court to the California Supreme Court to review its decision denying a hearing to petitioner in the Second Beard Opinion and in effect validating the affirmance of the judgment for Plaintiff-Respondent rendered in the trial court.

The first Beard Opinion by the California Court of Appeal, reversing a nonsuit which had been granted in favor of Petitioner herein, and ordering a new trial, was filed on February 5, 1970, and is reported as *Beard v. The Atchison, Topeka and Santa Fe Railway Company*, 4 Cal.App.3d 130, 84 Cal.Rptr. 449.

A copy of the Opinion, which, in contravention of United States Supreme Court Rule 23(i), Petitioner failed to append to its petition for certiorari, is attached hereto as Appendix A. On April 1, 1970, the California Supreme Court denied a hearing. No petition for certiorari to this court was sought by Petitioner herein with respect to said Opinion.

The second trial resulted in a judgment for plaintiff Alfred Beard, respondent herein. Said judgment was affirmed by the California Court of Appeal, in what is designated herein and in the Petition as the "second" Beard Opinion. Said Opinion was certified by the California Court of Appeal, under the California Court Rules, as "Not For Publication", is not reported, and is attached as Appendix B to the Petition. The California Supreme Court denied a hearing.

Statement of the Case.

The facts of the case, as set forth by the California Court of Appeal in the First Beard Opinion are as follows:

Plaintiff (Respondent herein) Alfred Beard, then age 14, was

> "walking home from school with a group of his friends. As plaintiff and his friends crossed defendant's right-of-way adjacent to Slauson Avenue, a slow-moving (10-15 miles per hour) freight train came along, and two of the friends climbed aboard the train in order to ride it a short distance. After they had gotten on, plaintiff ran alongside the train, grasped the handle bar at the end of a box car, and attempted to pull himself aboard. According to plaintiff, as he placed his

feet on the sill step of the box car two and one-half feet above the ground the step wobbled and gave way, and he fell beneath the wheels of the train.

"The train passed the point of the accident at the same time every afternoon. The track was straight, and visibility was unobstructed, but a half block away there was a brick wall behind which children could hide from the view of the crew as the front of the train passed by. . . . The train was manned by a crew of five, of whom three (two brakemen and the fireman) were charged with the duty to watch for persons attempting to board the train. At the scene of the accident these three had previously seen children walking near the tracks, hiding and ducking behind the wall, and approaching closely enough to the train to require either warning from the crew or emergency application of the brakes. They had also seen children actually boarding trains at other locations. . . . *(A)t the point of the accident hopping and riding of the train by school children was a common, almost daily, occurrence.*" (Emphasis added.) (4 Cal.App. at 133-134, 84 Cal.Rptr. at 452; Appendix A, pp. 2-3.)

As the California Court of Appeal summarized Respondent's Complaint (4 Cal.App.3d at 133, 84 Cal. Rptr. at 452; Appendix A, p. 1):

"In his first count he pleaded the railroad's negligence; in his second count its violation of the Federal Safety Appliance Act (45 U.S.C. § 11) in maintaining a box car sill step in an unsafe condition. Before trial defendant's motion for summary

judgment was granted on the second count because plaintiff was not a person to whom a cause of action had been given by the Safety Appliance Act; at trial defendant's motion for a nonsuit on the first count was granted at the conclusion of plaintiff's case. Plaintiff appeals the judgment in favor of defendant on both counts."

The nonsuit was based on the trial court's ruling that (1) the Federal Safety Appliance Act was not applicable and (2) "two of the conditions required to impose liability on the railroad on the ground of attractive nuisance had not been met", citing various California cases. (4 Cal.App.3d at 134-135, 84 Cal.Rptr. at 453; Appendix A, p. 3.)

The California Court of Appeal in the First Beard Opinion reversed the nonsuit herein which had been based on the trial court's ruling that because of prior California cases, the attractive nuisance doctrine could not serve as a basis for a charge of common law negligence against the railroad. The Court of Appeal distinguished said prior California cases and declared them superseded by the intervening decision of the California Supreme Court in *Rowland v. Christian*, 69 Cal.2d 108, 70 Cal.Rptr. 97, 443 P.2d 561. The Court, as more fully set forth hereinafter, held that under the facts of the case and the principles of *Rowland v. Christian, supra*, liability of the railroad could be based on two separate and distinct factors, (1) an inadequate "warning system" and (2) maintenance of railroad property in a dangerous condition "in violation of a safety statute, a violation which if true, would furnish some evidence of the railroad's negligence". The Court held that there was no absolute liability on the part of the railroad based on the Federal Safety

Appliance Act, to plaintiff herein, since he was not a railroad employee.

The judgment for plaintiff-respondent, obtained in the second trial, after the said holdings in the First Beard Opinion, was affirmed by the Court of Appeal in the Second Beard Opinion (Appendix B to the Petition). The trial court at the second trial had applied the law as declared in the First Beard Opinion pursuant to the California doctrine of "the law of the case", and the Court of Appeal, in the Second Beard Opinion affirmed the judgment on the basis of said doctrine, and the law of California. See, *e.g., Estate of Baird,* 193 Cal. 225, 258; *Tally v. Ganahl,* 151 Cal. 418; *Gore v. Bingaman,* 20 Cal.2d 118, 124 P.2d 17; *Allen v. Cal. Mutual B. & L. Assn.*; 22 Cal.2d 474, 139 P.2d 321. See Petition for Certiorari, Appendix B, pp. 3, 4, 5, 7, 8 and 9.

Summary of Argument.

The judgment and opinions herein were based on two separate factors, both of which constituted independent, adequate state grounds for the decisions. The first ground, that of the general common law negligence law of California, in no manner involved any federal issue. The second ground, that violation of the Safety Appliance Act was evidence of negligence, also constituted an adequate, independent state ground. For even where a statute is clearly not intended to benefit a particular class of persons, a state may determine, as California did herein, that the statute does set a standard and is evidence of negligence which inures to the benefit of that class. Petitioner makes no attempt to demonstrate that the state grounds cannot account for the judgment and decisions herein.

The opinions do not conflict with any decisions of this court.

The opinions herein are not of sufficient importance to warrant review by this court. California has now provided by statute that no unauthorized person injured while getting on or off a railroad car shall recover any damages in the absence of an intentional act of the railroad with knowledge that serious injury is the probable result of such act, or with a wanton and reckless disregard of the probable result of such act. The achievement of a result similar to the Beard judgment herein in other jurisdictions would be dependent on the unlikely recurrence of the unique combination of law and facts that existed herein. The Second Beard Opinion was certified for nonpublication, and may not be cited anywhere.

Petitioner should have sought review by this court after the denial of a hearing by the California Supreme Court in the First Beard Opinion. Although at the time there was not yet any award for Respondent herein, Petitioner knew that under the California doctrine of the "law of the case" the law as declared in the First Beard Opinion, whether correct or incorrect, would be binding on any subsequent trial or appellate proceedings.

For the aforementioned reasons alone this Court should deny certiorari.

ARGUMENT.

I.

The Judgment Below Was Expressly Based on Adequate, Independent State (Nonfederal) Grounds and This Court Should Therefore Deny the Petition for Certiorari.

As indicated hereinafter both the first and second opinions of the California Court of Appeal and the judgment of the trial court were expressly based on, and supported by adequate, independent, tenable state grounds. The Petition for Certiorari should for this reason alone be denied.

It is well-settled that where the state court expressly bases its decision upon two grounds, one federal and the other nonfederal, the Supreme Court lacks jurisdiction and will deny review if the nonfederal ground is independent and adequate to support the judgment. See *Fox Film Corp. v. Muller,* 296 U.S. 207; *Enterprise Irrig. Dist. v. Farmers' Mutual Canal Co.,* 243 U.S. 157; *Cramp v. Board of Public Instruction,* 368 U.S. 278.

A. The First Ground of the Judgment Below Was Based on Principles of General Common Law Negligence, in No Manner Involving the Federal Safety Appliance Act, and Constituted an Independent, Adequate State Ground for the Judgment Herein.

As noted hereinafter the Opinions herein were based on two separate grounds. It is necessary to quote extensively from the First Beard Opinion to show conclusively that the judgment below had an adequate, independent basis in state law, not only as to the first, but also as to the second, ground thereof.

The First Beard Opinion, in reversing the nonsuit herein, stated (4 Cal.App.3d at 135-137, 84 Cal.Rptr. at 453-455; Appendix A, pp. 3-7):

> "In granting defendant's motion for a nonsuit at the close of plaintiff's case, the trial court concluded that the Safety Appliance Act did not impose absolute liability on the railroad, that the Safety Appliance Act was not intended to benefit trespassing children and therefore its violation could not be used to establish negligence, and that two of the conditions required to impose liability on the railroad on the ground of attractive nuisance had not been met. (Restatement, Second, Torts, § 339(c) and (d).) The trial court relied on a series of cases holding that juveniles of plaintiff's age are deemed to have assumed the risks which result from boarding moving freight trains. (Smith v. Southern Pacific Co., 222 Cal.App.2d 728, 35 Cal.Rptr. 575; Joslin v. Southern Pacific Co., 189 Cal.App.2d 382, 11 Cal. Rptr. 267; Herrera v. Southern Pacific Co., 188 Cal.App.2d 441, 10 Cal.Rptr. 575; Gutirrez v. Southern Pacific Co., 174 Cal.App.2d 866, 345 P.2d 326.) (Footnote omitted.)"
>
> "Plaintiff argues that the evidence was sufficient to establish liability under any of the following theories: (1) violation of the Safety Appliance Act; (2) attractive nuisance (Restatement, Second, Torts, § 339); (3) concealed trap (Reynolds v. Willson, 51 Cal.2d 94, 101-102, 331 P.2d 48; (4) constant intruder (Restatement, Second, Torts, §§ 334, 335.) Additionally he argues that the rule adopted in Rowland v. Christian, 69 Cal. 2d 108, 70 Cal.Rptr. 97, 443 P.2d 561, makes a

possessor of property liable for negligence to a trespasser whenever the possessor's conduct foreseeably creates an unreasonable risk of harm.

"The nonsuit in this case preceded the decision of the Supreme Court in Rowland v. Christian, and the trial court on the basis of doctrine as it then stood (Restatement, Second, Torts, § 339) took the view that the burden rested on plaintiff to establish that because of his youth he did not realize and appreciate the risk of boarding a moving freight train. On appeal, however, we must apply the law as it stands today. . . ."

"Because the judgment on the first count resulted from a nonsuit the specific question thereby presented is whether plaintiff satisfied its burden of establishing a prima facie case. The answer to this question is largely shaped by the substantive and procedural changes in the law brought about by Rowland v. Christian. . . . which we now consider in terms of its effect on the parties' burden of proof.

"Under Rowland v. Christian, the liability of a possessor of property to trespassing children is no longer limited by the conditions set out in Restatement, Second, Torts, § 339 (approved in King v. Lennen, 53 Cal.2d 340, 1 Cal.Rptr. 665, 348 P.2d 98, and in *Smith, Joslin, Herrera,* and *Gutirrez, supra*), or by the terms of other special doctrines and theories created as exceptions to a general rule barring trespassers from recovery for negligence, but is governed by Civil Code, section 1714, which imposes general liability on every person for injuries occasioned to others by want of ordinary care in the management of his property. The

status of a claimant at the time of his injury no longer affects the general duty of the possessor of property to exercise ordinary care with respect to reasonable foreseeable risks of personal injury to persons coming on the property. The possessor's duty of ordinary care extends to invitees and trespassers alike. . . . The former gradations of degree in the possessor's duty of care, which varied with the status of persons on the property, have been superseded by a generic duty owed to all persons on the property based on the reasonable foreseeability of harm to them. Under Rowland v. Christian the extent of a possessor's duty is controlled by the foreseeability of the risk and not by the status of the person injured.

"Since a person's status as a trespasser is now largely immaterial and no longer determines that he assumed the risk of personal injuries caused by a possessor's negligence, it follows that the various exceptions to the former rule prohibiting trespassers from recovery for negligence no longer serve their intended purpose. One such exception is that of attractive nuisance, an exception designed to permit children who would otherwise be barred from recovery by their status as trespassers to recover under certain conditions for injuries resulting from a possessor's negligence. A trespassing child could show that as a child he did not realize the risk involved in coming on the property, hence he had not assumed this risk, and therefore he qualified as an exception to the general rule of nonrecovery by trespassers against negligent possessors of property. Under the attractive nuisance exception a trespassing child had the

burden of proving his lack of appreciation of the risk involved in coming on the property (i.e. rebutting the presumption that as a trespasser he assumed the risk) and also the burden of proving the feasibility to the possessor of eliminating the dangerous condition. (Restatement, Second, Torts, § 339; Joslin v. Southern Pacific Co., 189 Cal. App.2d 382, 387, 11 Cal.Rptr. 267.)

"But under the new rule proof of trespass no longer creates a presumption that the trespasser took the property as he found it, and a trespassing adult need not rebut the presumption that he assumed the risk of the possessor's negligence in going upon the property. A fortiori, a trespassing child is entitled to the benefit of the same rule. Hence the defense of assumption of risk must be established by defendant in some manner other than mere proof that plaintiff was a trespasser. Defendant can no longer shift the burden on this issue to plaintiff by demonstrating that plaintiff was a trespasser. Since the burden of proving assumption of risk remains on defendant throughout, it follows that a trespassing child no longer need prove his realization of the risk in order to rebut the presumption that he assumed it.

"Consequently, while plaintiff has the burden of proving defendant's negligence, and defendant has the burden of proving plaintiff's contributory negligence, both as before, defendant now has the burden of proving assumption of the risk—for trespasser and invitee alike. (Inouye v. Pacific Gas & Electric Co., 53 Cal.2d 361, 367-368, 1 Cal.Rptr. 848, 348 P.2d 208) With this critical change in the burden of proof in mind we briefly take up the main issues in the case."

The court, clearly delineating two independent grounds for its decision and setting forth, *at the very least,* one independent, adequate state ground, stated as follows (4 Cal.App.3d at 137-138, 84 Cal.Rptr. at 455; Appendix A, pp. 7-8):

> "To establish the railroad's negligence plaintiff relied on *two factors. First,* the railroad knew, or should have known, that children regularly hopped rides at this particular location on this particular train and negligently failed to take action to prevent such activity, either by maintaining a better lookout on the train or a stricter police of its right-of-way. Essentially, this factor was premised on the failure of the railroad to provide an adequate and effective warning system for those who it could anticipate might need it. *Second,* plaintiff charged the railroad with negligence in maintaining a loose sill step on a box car, which caused plaintiff to fall from the box car beneath the wheels of the train. Clearly, this *second* factor charged the maintenance of railroad property in a dangerous and defective condition in violation of a safety statute, a violation which, if true, would furnish *some evidence* of the railroad's negligence. (Alarid v. Vanier, 50 Cal.2d 617, 327 P.2d 897; cf. Ev.Code, § 669.) *Either factor,* if given credence, might be sufficient to support plaintiff's claim that defendant had been negligent, for *both* involved a reasonably foreseeable risk of harm to others arising out of a want of ordinary care in the management of defendant's property. The contemporary test of negligence has been stated in Dillon v. Legg, 68 Cal.2d 728, at 740, 69 Cal. Rptr. 72, at 80, 441 P.2d 912, at 920: 'Since

> the chief element in determining whether defendant owes a duty or an obligation to plaintiff is the foreseeability of the risk, that factor will be of prime concern in every case. Because it is inherently intertwined with foreseeability such duty or obligation must necessarily be adjudicated only upon a case-to-case basis.' Judged by this standard *each of the two factors relied on by plaintiff could qualify as proof of actionable negligence under section 1714.* (Taylor v. Centennial Bowl, Inc., 65 Cal.2d 114, 121, 52 Cal.Rptr. 561, 416 P.2d 793; Laird v. T. W. Mather, Inc., 51 Cal.2d 210, 216, 331 P.2d 617.)" (Emphases added.)

Thus the First Beard Opinion expressly and unequivocally stated that plaintiff relied on "two factors", "first" that the railroad had actual or constructive knowledge "that children regularly hopped rides at this particular location on this particular train and negligently failed to take action to prevent such activity, either by maintaining a better lookout on the train or a stricter police of its right-of-way", a factor, the Court stated, premised on an inadequate "warning system for those who it could anticipate might need it"; "second", negligence in maintaining a loose sill step on a box car. The Court declared that "clearly, this second factor charged a maintenance of railroad property in a dangerous and defective condition in violation of a safety statute, a violation which, if true, would furnish some evidence of the railroad's negligence" (citing California authority); that "*either factor* . . . might be sufficient to support plaintiff's claim" of negligence; and that "*each of the two factors* relied on by plaintiff would qualify as proof of actionable negligence" under California law. (Emphases added.)

Thus there were two separate and distinct and totally unrelated grounds of the decision. The "first" ground, that of common law negligence, contained no element whatsoever of the violation of the Federal Safety Appliance Act. It was an unalloyed state, or nonfederal ground, that of common law negligence, independent of the Federal Safety Appliance Act, and was adequate and "sufficient" to support the judgment. (As to the second ground, see the discussion hereinafter.)

As set forth hereinabove, the judgment of the trial court, rendered in accordance with the rules of law as declared by the First Beard Opinion, was affirmed by the California Court of Appeal in the Second Beard Opinion on the basis of the law of the case and the law of California.

That under California law a general common law duty of due care is owed even to a trespasser, *notwithstanding the absence of any statutory standard protecting the trespasser* (because of *Rowland v. Christian*, 69 Cal.2d 108, 70 Cal.Rptr. 97), is clearly demonstrated in the recent California Supreme Court case of *Mark v. Pacific Gas & Electric Company*, 7 Cal.3d 170, 101 Cal.Rptr. 908, 496 P.2d 1276 (1972).

In *Mark*, plaintiff's decedent, a trespasser, was electrocuted while attempting to remove a light bulb from a street lamp. *Defendant did not violate any law or safety ordinance* (7 Cal.App.3d at 178 n.6, 101 Cal.Rptr. at 913 n.6). The trial court, trying the case prior to *Rowland v. Christian, supra*, granted a nonsuit on the theory that no duty of care was owed to a trespasser. The California Supreme Court reversed (citing the *Beard* case) and held (7 Cal.App.3d at 177-178, 101 Cal.Rptr. at 912-913) that it must "analyze

the evidence in the light of *Rowland's* principles in determining whether any basis exists for finding PG&E negligent toward decedent."

The court declared that (7 Cal.3d at 176, 101 Cal. Rptr. at 911):

> "The active/passive negligence concept, however, no longer represents an inflexible limitation upon the imposition of liability to trespassers or licensees. . . .
>
> ". . . Accordingly, in *Rowland* we declined to follow and perpetuate the foregoing rigid classifications, immunities and exceptions, adopting in their place the basic test 'whether in the management of his property he [the possessor of land] has acted as a reasonable man in view of the probability of injury to others . . . the status is not determinative'. . . ."

The court continued (7 Cal.3d at 178, 101 Cal. Rptr. at 913):

> ". . . plaintiff's evidence was sufficient to indicate that PG&E knew, or at least should have known, that Calvin or his roommates had been unscrewing the bulb of the lamp post; that the presence of high voltage current constituted a high risk of harm to anyone tampering with the bulb; that reasonable safety precautions (such as straightening the bent post, locking the canopy in place, or warning of high voltage) could have been taken; and that PG&E's failure to take such precautions rendered the lamp post and bulb unsafe. As such a trier of fact could reasonably conclude that PG&E's failure to warn or to repair this dangerous condition constituted negligence." (Footnotes omitted.)

Thus, *Mark, supra,* affords ample evidence that California law now imposes on an owner or occupier of land a duty of due care without regard to plaintiff's status as a trespasser, licensee or invitee, and that this duty is based on common law principles of foreseeability, *irrespective of the existence or nonexistence of any statutory protection for the injured claimant.* As aforesaid, the judgment herein was based on this independent, adequate state ground.

B. Even the Second Ground of the Judgment Below, That the Violation of the Federal Safety Appliance Act Is Evidence of Negligence, Furnishes No Basis for Certiorari Inasmuch as It (1) Is an Adequate State Ground and (2) Does Not Conflict With Federal Decisions.

As set forth hereinafter even the second ground of the judgment herein, that violation by Petitioner of the Federal Safety Appliance Act constitutes, according to California law, evidence of Petitioner's negligence, affords Petitioner no basis for certiorari herein, for two reasons.

First, the doctrine of adequate state ground is sufficient here also to insulate the judgment from review by this Court. Second, the ground does not conflict, but is consistent with, the Federal decisions.

The California Court of Appeal herein (First Beard Opinion) held that, inasmuch as a nonemployee is outside the purview of the Act, citing a decision by this Court (*Crane v. Cedar Rapids & I.C.R. Co.,* 395 U.S. 164), the absolute liability provisions of the Federal Safety Appliance Act are not available for the benefit of Respondent herein. The Court proceeded to state, however, that violation of the Act does constitute, according to California law, for the trier of fact, "some

evidence of the railroad's negligence." (4 Cal.App.3d at 137, 141-142, 84 Cal.Rptr. at 455, 458.)

Similarly, the Second Beard Decision (Appendix "B" of the Petition for Certiorari, p. 5) states, in discussing the holdings of the First Beard Opinion on this point:

> "The court was well aware of the purpose of the Federal Safety Appliance Act and held that it did not impose absolute liability on the railroad. (4 Cal.App.3d at pp. 141-42.) The court ruled, however, '[t]o establish the railroad's negligence plaintiff relied on two factors. . . . Second, plaintiff charged the railroad with negligence in maintaining a loose sill step on a box car, which caused plaintiff to fall from the box car beneath the wheels of the train. Clearly, this second factor charged the maintenance of railroad property in a dangerous and defective condition in violation of a safety statute, a violation which, if true, would furnish some evidence of the railroad's negligence. (*Alarid v. Vanier*, 50 Cal.2d 617 . . . cf. Evid. Code, § 669.) Either factor, if given credence, might be sufficient to support plaintiff's claim that defendant had been negligent, for both involved a reasonably foreseeable risk of harm to others arising out of a want of ordinary care in the management of defendant's property.' (4 Cal.App.3d at p. 137.) The trial court therefore properly applied the prior appellate decision in instructing the jury that violation of the federal statute constituted evidence of negligence. But in any event the recent case of *Cappa v. Oscar C. Holmes, Inc.*, 25 Cal.App.3d 978, 982-83, squarely supports the result."

In *Cappa v. Oscar C. Holmes, Inc.*, 25 Cal.App.3d 978, 102 Cal.Rptr. 207 (1972),

a 16-year-old boy passed through an opening in a fence or barricade around some construction, despite a sign stating "Danger—construction parking only" and was injured. Defendant had violated a safety order which, in the words of the court, "obviously . . . was primarily intended for the benefit and protection of workmen." The court held that the safety order also protected "members of the public consensually on the subject premises" and in view of *Rowland v. Christian*, 69 Cal.2d 108, 70 Cal.Rptr. 97, 443 P.2d 561, it was impelled to hold that the industrial order applied for the benefit of a trespasser.

The statement by the Court of Appeal in the Second Beard Opinion that "in any event the recent case of Cappa v. Oscar C. Holmes, Inc. . . . squarely supports the result", indicates that according to California law, violation of a statute which was "ordinarily intended" for workmen does, nevertheless constitute evidence of negligence in favor of a trespasser, in view of *Rowland v. Christian, supra.*

The states, through their legislatures or courts, can create their own principles of negligence liability and set standards of conduct, whether fixed as a matter of law or dependent upon conclusions arrived at by a trier of fact. In the latter case the legislature or court may permit the trier of fact to accord certain evidentiary weight to particular relevant facts in arriving at its conclusion. In the absence of any "due process" considerations, there could be no federal objection. The relevant facts herein were the violation of the Safety Appliance Act under the facts and circumstances of

the case. The Court of Appeal properly held that this was evidence which could support a finding of negligence by a trier of fact.

Dealing precisely with this issue, Dean Prosser states very clearly that where a statute is undoubtedly not intended to benefit a particular class of persons and hence as to them violation does not result in absolute liability, *nevertheless the statute does set a standard and is evidence of negligence, which inures to the benefit of the class as to whom there is no absolute liability.* In *Prosser, Torts,* 4th ed., page 202, the author states:

> ". . . and where the statute does set up standard precautions, *although only for the protection of a different class of persons,* or the prevention of a distinct risk, this may be a relevant fact, having proper bearing upon the conduct of a reasonable man under the circumstances, which the jury should be permitted to consider. There is, in other words, a *statutory custom, which is entitled to admission as evidence.* . . . The arbitrary classification of all breaches of statute as negligence per se or no negligence at all leaves too little flexibility for the standard of reasonable care." (Emphases supplied.)

In *Slick Oil Co. v. Coffey,* 72 Okla. 32, 177 Pac. 915, the jury was instructed that if the place furnished to deceased to work was "rendered unsafe and dangerous because of a violation of the statutes of this state . . . and if they found that such law was violated, and that such violation amounted to negligence . . . and that such negligence was the proximate cause of his death, then they should find for plaintiff. This instruction is said to be highly prejudicial to defendant (because the statute) . . . was not enacted for the benefit of that class of persons to which deceased belonged,

and therefore did not furnish the basis for a cause of action based upon a violation thereof."

Stating (177 Pac. at 916) that the instruction did not tell the jury whether a violation of the statute constituted negligence, but submitted that issue to them, and that the "reference" in the instruction to the statute did not mislead the jury, the court continued (177 Pac. at 916):

> "In such cases the action by the injured party is not based upon the statute or ordinance, but nevertheless proof of a violation thereof is permitted as evidence tending to establish negligence. The statute in question, conceding the contention that it was not passed for the benefit of that class of persons to which deceased belonged and was passed for the benefit of the public generally, has as one of its objects the protection of property, and by analogy it may be said that, in an action for injuries caused by a violation thereof, proof of such violation would be evidence of negligence. A common illustration of the application of this rule is in cases where railroads are required by statute to fence their right of way, or where the speed of trains is limited by ordinance. In case of a statute requiring the right of way to be fenced, though the statute is held to be for the protection of animals and gives to the owner thereof cause of action for the breach of duty, yet it is held, in an action for injuries to persons arising from the same default, that while the failure to fence is not conclusive of liability as in case of animals, still an action will lie for the personal injury, and this breach of duty will be evidence of negligence."

In *Hansen v. Kemmish,* 201 Iowa 1008, 208 N.W. 277, 279, 45 A.L.R. 498, the court said:

> "But even though the injury complained of is not within the purview of the statute, the disregard of statutory duty may be a material fact and evidence of negligence."

The court held that all circumstances, including "the fence laws" were to be taken into consideration by the jury.

Additionally, review by this Court, even as to this second "factor" (violation of the Act as evidence of negligence) is foreclosed not only because of the doctrine of adequate state ground, but because of *this* court's acknowledgment that state courts may fashion remedies for violation of the Safety Appliance Act when the claimant is not one of the persons intended to be covered thereby.

The California Court in the first Beard opinion quoted from this Court's decision in *Crane v. Cedar Rapids & I.C.R. Co.,* 395 U.S. 164, 165 that " 'In contrast, the nonemployee must look for his remedy to a common-law action in tort, which is to say that he must sue in a state court, in the absence of diversity, to implement a state cause of action'." (4 Cal.App.3d at 141, 84 Cal.Rptr. at 458; Appendix A, p. 15.) No Federal decision construing the Act inhibits a state court from permitting a trier of fact to consider as evidence of negligence, in the words of Prosser, *supra,* a "statutory custom" as a "relevant fact", even if such relevant fact was the violation of the Safety Appliance Act.

This Court in *O'Donnell v. Elgin, Joliet & Eastern Ry. Co.,* 338 U.S. 384, 70 S.Ct. 200, 94 L.Ed. 187 (1948) clearly set forth the conceptual difference be-

tween absolute liability based on violation of the Safety Appliance Act, and liability based on general negligence.

In *Shields v. Atlantic Coast Line R. Co.*, 350 U.S. 318, 76 S.Ct. 386, 100 L.Ed. 364 (1956), suit was brought by an injured independent contractor

> "alleging in one count . . . absolute liability for a violation of the [Safety Appliance] Act and in a second count common-law negligence. The jury returned a general verdict in his favor. The Court of Appeal reversed and remanded for a new trial on the negligence count alone, holding that the trial court erred in instructing that the dome running board was a safety appliance".

This court, holding that a dome running board is a safety appliance within the Safety Appliance Act, reversed the judgment of the Court of Appeals and reinstated the judgment of the Federal District Court, because the claimant, in addition to having a common-law negligence action, was entitled to have his case submitted to the jury on the theory of absolute liability for a violation of the Safety Appliance Act.

During argument herein on the proposed instruction that violation of the Safety Appliance Act constituted evidence of negligence, and during the post-trial motion for a new trial, petitioner's counsel, Mr. Witteman, conceded that the "law of the case" was that a violation of the Act under the facts herein would constitute at least some evidence of negligence (as contrasted with the absolute liability).

As set forth in the Reporter's Transcript of the second trial, page 2960:

> "The Court: I think what this case tells me is that it (violation of the Federal Safety Appliance Act) is some evidence of negligence.
>
> "Mr. Witteman: That's all it says.
>
> "The Court: That is what I'm going to say, basically.
>
> "Mr. Witteman: And that's all."

During the hearing on the motion for new trial, petitioner's counsel stated:

> "As counsel says it will not relitigate the issue because Justice Fleming has already decided it. By the same token I am not going to belabor it here."

The trial court stated that it felt bound by it. [R.T. 3154, 3156.]

C. Petitioner Has Failed to Demonstrate, as It Must, That State Grounds Cannot Account for the Decision Herein.

Where an adequate state ground is asserted, petitioner "must demonstrate" that the state ground cannot account for the state decision. Petitioner has not even attempted to do this herein, and indeed, cannot do so.

In *Durley v. Mayo,* 351 U.S. 277, 281, this court stated:

> "In the face of these expressions of the law of Florida, petitioner, in order to establish our jurisdiction, *must demonstrate* that neither of these state grounds can account for the decision below." (Emphasis added.)

In *Williams v. Kaiser,* 323 U.S. 471, 477-478, this Court stated:

> "It is a well established principle of this Court that before we will review a decision of a state court it must affirmatively appear from the record that the federal question was presented to the highest court of the State having jurisdiction and that its decision of the federal question was necessary to its determination of the cause. *Honeyman v. Hanan,* 300 U.S. 14, 18; *Lynch v. New York,* 293 U.S. 52. And where the decision of the state court might have been either on a state ground or on a federal ground and the state ground is sufficient to sustain the judgment, the Court will not undertake to review it. *Klinger v. Missouri,* 13 Wall. 257, 263; *Wood Mowing & Reaping Machine Co. v. Skinner,* 139 U.S. 293, 297; *Allen v. Arguimbau,* 198 U.S. 149, 154-155; *Lynch v. New York, supra.*"

To the same effect see:

Adams v. Russell, 229 U.S. 353;
Eustis v. Bolles, 150 U.S. 361;
Woods v. Nierstheimer, 328 U.S. 211.

If the decision of the state court "might" have rested on a nonfederal ground, this court will not take jurisdiction. As this Court stated in *Ellis v. Dixon,* 349 U.S. 458, 459, in dismissing certiorari as improvidently granted:

> "The New York Court of Appeals denied petitioner's motion for leave to appeal without stating any ground for its decision. . . . In those circumstances we must ascertain whether that court's decision 'might' have rested on a nonfederal ground, for if it did we must decline to take jurisdiction. . . ."

Similarly in *Stembridge v. George*, 343 U.S. 541, 547, this court stated:

> "Where the highest court of the state delivers no opinion and it appears that the judgment *might* have rested upon a nonfederal ground, this Court will not take jurisdiction to review the judgment. *Hedgebeth v. North Carolina*, 334 U.S. 806; *Woods v. Nierstheimer*, 328 U.S. 211; *White v. Ragen*, 324 U.S. 760; *McGoldrick v. Gulf Oil Corp.*, 309 U.S. 2; *Woolsey v. Best*, 299 U.S. 1; *Lynch v. New York ex rel. Pierson*, 293 U.S. 52; *Cuyahoga Power Co. v. Northern Realty Co.*, 244 U.S. 300, 303-304; *Adams v. Russell*, 229 U.S. 353, 358-362; *Allen v. Arguimbau*, 198 U.S. 149, 154-155; *Johnson v. Risk*, 137 U.S. 300, 307; *Klinger v. Missouri*, 13 Wall. 257, 263."

In Stern & Gressman, *Supreme Court Practice*, Fourth Ed., pages 134-135, the authors state:

> "Where both federal and nonfederal questions are properly raised in the record but no opinion is delivered by the highest state court in rendering its judgment, or the opinion is ambiguous, the Supreme Court ordinarily presumes that the decision is based upon a nonfederal ground raised in the record which may be found adequate to support it. This presumption grows out of the principle that there must be some affirmative showing in the record that a federal question was presented to the state court and that a decision on such question was necessary to a determination of the cause. Where this is not clearly indicated, especially because of the presence of an adequate nonfederal ground, jurisdiction will be declined. *Lynch v. New*

> *York ex rel. Pierson,* 293 U.S. 52, 54-55; *Adams v. Russell,* 229 U.S. 353, 358; *Woods v. Nierstheimer,* 328 U.S. 211; *Phyle v. Duffy,* 334 U.S. 431; and see *Williams v. Kaiser,* 323 U.S. 471, 477. And where adequate state grounds are asserted and appear reasonable, 'petitioner, in order to establish our jurisdiction, must demonstrate that neither of these state grounds can account for the decision below.' *Durley v. Mayo,* 351 U.S. 277, 281. That burden of establishing jurisdiction is not met if 'it appears that the judgment [below] *might* have rested upon a nonfederal ground.' *Ibid.; Stembridge v. Georgia,* 343 U.S. 541, 547; *Ellis v. Dixon,* 349 U.S. 458, 459." (Footnote omitted.)

In *New Orleans v. New Orleans Water Works Co.,* 142 U.S. 79, 84, this court stated:

> "If it appears either that the decision of the state court was made upon rules of general jurisprudence, or that the case was disposed of upon other grounds, broad enough in themselves to sustain the judgment without considering the federal question, and that such question was not necessarily involved, the jurisdiction of this court will not attach."

As set forth above, the California Court of Appeal based the judgment herein upon "general" (common law) jurisprudence, *i.e.,* the new principle promulgated by *Rowland v. Christian, supra,* that a duty of due care is owed to all, even a trespasser, and that it is therefore no longer necessary to invoke the doctrine of attractive nuisance as a prerequisite to liability to a trespasser.

The Opinions herein, without any ambiguity, indicate that nonfederal grounds form the basis of the judgment. Assuming, *arguendo,* an ambiguity, this Court "ordinarily presumes that the decision is based upon a nonfederal ground raised in the record which may be found adequate to support it." Stern & Gressman, *Supreme Court Practice, supra,* page 134.

Petitioner has made no attempt to "demonstrate", as required by this court in *Durley v. Mayo, supra,* 351 U.S. 277, 281, that state grounds cannot account for the Opinions herein. Certainly, at the very least, the judgment below *"might* have rested upon a nonfederal ground".

II.

Petitioner Was Remiss in Failing to Petition This Court for Certiorari After the Denial by the California Supreme Court of a Hearing After the First Beard Opinion.

The First Beard Opinion declared that although the Safety Appliance Act was not applicable to respondent herein and therefore there was no absolute liability to him, nevertheless violation of the Act could constitute some evidence of the railroad's negligence. The Opinion reversed the nonsuit and ordered a new trial based on this holding and on its ruling that, besides the sill step, general common law principles of negligence were also sufficient to sustain the judgment. When the California Supreme Court denied a hearing, said principles and holdings became, under California law, the "law of case" binding on the parties at all subsequent trial and appellate proceedings, *whether or not the Court had originally correctly determined the law. Tally v. Ganahl,* 151 Cal. 418; *Gore v. Bingaman,* 20 Cal.2d 118,

124 P.2d 17; *Allen v. Cal. Mutual B. & L. Assn.*, 22 Cal.2d 474, 139 P.2d 321; *Estate of Baird*, 193 Cal. 225. See Petition for Certiorari, Appendix B, pages 3-4.

Petitioner therefore knew that on retrial the court would be constrained to instruct that violation of the Act could constitute some evidence of negligence. See also remarks by Petitioner's counsel, *supra*, page 23. Petitioner nevertheless failed at the time of said denial of a hearing, to seek review by this Court, permitting the second trial to proceed on the basis of said principles. It is respectfully submitted that Petitioner should have sought review by this Court prior to the lengthy second trial hereof, inasmuch as, because of the "law of the case", there was an exceptional reason to do so.

In this connection it is appropriate to quote from *Stern & Gressman, Supreme Court Practice*, Fourth Ed., pages 180-181, wherein the authors state:

> "But where there is some important and clear-cut issue of law that is fundamental to the further conduct of the case and that would otherwise qualify as a basis for certiorari, the case may be reviewed despite its interlocutory status. See *United States v. General Motors Corp.*, 323 U.S. 373, 377; *Gillespie v. United States Steel Corp.*, 379 U.S. 148, 153; *Land v. Dollar*, 330 U.S. 731, 734, n. 2; *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 685, n. 3. Thus, in the two cases last cited, the Supreme Court consented to review decisions raising important jurisdictional questions when the court of appeals had reversed the granting of a motion to dismiss and

had ordered the case remanded for trial. A lower court decision affirming the issuance of a preliminary injunction, moreover, has been reviewed on certiorari where 'there was an insuperable objection to the maintenance of the suit in point of jurisdiction and where it clearly appears that the decree was the result of an improvident exercise of judicial discretion.' *Myers v. Bethlehem Corp.*, 303 U.S. 41, 52, and cases cited. And the Court has reviewed and reversed the refusal of a court of appeals to issue a writ of mandamus that would have required the district court to hold a jury trial as to a certain issue rather than try the case without a jury. *Beacon Theatres v. Westover,* 359 U.S. 500. A Court of Claims order suspending court proceedings pending exhaustion of further administrative remedies was reviewed and reversed in *Greene v. United States,* 376 U.S. 149, presumably in order to remedy an injustice already in litigation for over 10 years. Certiorari has also issued to review a nonfinal judgment where there was a conflict on a question of law with another court of appeals or a highest state court, a conflict which would justify review of a final decree or judgment. *United States v. General Motors Corp.*, 323 U.S. 373, 374; *Hanover Star Milling Co. v. Metcalf,* 240 U.S. 403, 408-409; *Forsyth v. Hammond,* 166 U.S. 506. And certiorari has been granted where the nonfinal judgment presented a novel and important question of law and where the petitioner's position, if sustained, would render the decision wholly void. *American Construction Co. v. Jacksonville, T. & K. R. Co.*, 148 U.S. 372." (Footnote omitted.)

III.

Certiorari Should Be Denied Because of the Current Unimportance of the Opinions Herein.

In addition to containing independent, adequate state grounds, the Opinions herein are not of sufficient importance to warrant certiorari.

In Stern & Gressman, *Supreme Court Practice*, Fourth Ed., pages 167-168, the authors state:

> "The existence of admittedly 'serious legal questions' may not be sufficient. *English v. Cunningham*, 361 U.S. 905, 907. . . .
>
> "The concept of importance relates, of course, to the importance of the issues 'to the public as distinguished from' importance to the particular 'parties' involved. *Layne & Bowler Corp. v. Western Well Works*, 261 U.S. 387, 393; *Rice v. Sioux City Cemetery*, 349 U.S. 70, 79."

The holding herein that violation of the Federal Safety Appliance Act constituted some evidence of negligence resulted from the unusual combination of the following factors:

(1) A train with a loose sill step in violation of the Safety Appliance Act, (2) a "*Rowland v. Christian*"-"*Beard*"-"*Mark v. Pacific Gas*" doctrine that a generic duty of due care is owed to all, irrespective of status as trespasser, licensee or invitee, (3) a rule that violation of a statute, which is not intended for the benefit of a particular class of persons, is nevertheless evidence of negligence in favor of such persons and (4) facts similar to those of the instant case.

There can be no recurrence of the *Beard* holding in California for in 1971 the holding of the First Beard

Opinion was nullified by the enactment of California Civil Code Section 1714.7 which provides as follows:

> "No person who is injured while getting on, or attempting to get on, a moving locomotive or railroad car, without authority from the owner or operator of the railroad, or who, having gotten on a locomotive or railroad car while in motion without such authority, is injured while so riding or getting off, shall recover any damages from the owner or operator thereof for such injuries unless proximately caused by an intentional act of such owner or operator with knowledge that serious injury is the probable result of such act, or with a wanton and reckless disregard of the probable result of such act."

Moreover, the California Court of Appeal has certified the Second Beard Opinion as "not for publication". Under Rule 977 of the California Rules of Court, an unpublished opinion "shall not be cited by a court or by a party in any other action or proceeding. . . ." A copy of said Rule is attached hereto as Appendix B.

As stated by the authors of Stern & Gressman, *Supreme Court Practice*, Fourth Ed., page 167:

> "And the problem, though intrinsically important, must be 'beyond the academic or the episodic.' *Rice v. Sioux City Cemetery*, 349 U.S. 70, 74, where after certiorari had been granted and argument heard, with the Court equally divided on an important constitutional problem, *the petition was dismissed upon discovery that a new state statute prevented the question from arising again in that state.*" (Emphasis added.)

While a few jurisdictions have followed the doctrine of *Rowland v. Christian, supra,* where licensees are involved,[1] the doctrine *is not gaining acceptance where the claimants are trespassers.* See, *e.g., Mounsey v. Ellard,* 297 N.E.2d 43, 51 n.7 (Mass. 1973), where the Massachusetts Supreme Court, while stating "we no longer follow the common law distinction between licensees and invitees" expressly declared:

> "We feel that there is significant difference in the legal status of one who trespasses on another's land as opposed to one who is on the land under some color of right—such as a licensee or invitee. For this reason, among others, we do not believe they should be placed in the same legal category. For example, one who jumps over a six foot fence to make use of his neighbor's swimming pool in his absence does not logically belong in the same legal classification as a licensee or invitee. Frankly, we are not persuaded as to the logic and reasoning in Rowland v. Christian, 69 Cal.2d 108, 70 Cal.Rptr. 97, 443 P.2d 561, in placing trespassers in the same legal status as licensees and invitees."

Likewise in *Werth v. Ashley Realty Co.,* 199 N.W.2d 899, 907 (N.D. 1972) the Supreme Court of North Dakota expressly declined to follow *Rowland v. Christian, supra,* and retained the "distinctions" between trespasser, licensee and invitee. The court added:

> "We note at present no great trend in the *Rowland* direction. Mion Construction Company

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[1]See: *Mile High Fence Co. v. Radovich,* 489 P.2d 308 (Colo. 1971); *Pickard v. City & County of Honolulu,* 51 Hawaii 134, 452 P.2d 445 (1969); *Smith v. Arbaugh's Restaurant, Inc.,* 469 F.2d 97 (D.C. Cir. 1972); *Cooper v. Goodwin,* .... F.2d .... (D.C. Cir. 1973); *Peterson v. Balach,* 199 N.W.2d 639 (Minn. 1972).

v. Rutledge, 123 Ga.App. 777, 182 S.E.2d 500 (1971); Cook v. Demetrakas, 275 A.2d 919 (R.I. 1971); Osterman v. Peters, 260 Md. 313, 272 A.2d 21 (1971); Arbogast v. Terminal Railroad Assn. of St. Louis, 452 S.W.2d 81 (Mo. 1970); Engel v. Friend's Hospital, 439 Pa. 559, 266 A.2d 685 (1970); Brewer v. Annett, 86 Nev. 700, 475 P.2d 607 (1970)."

Other decisions have similarly failed or refused to follow *Rowland, supra.*[2]

Conclusion.

For the reasons expressed above the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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[2]See, *e.g.: Georgia Power Co. v. McGruder,* 229 Ga. 811, 194 S.E.2d 440 (1972); *Montega Corp. v. Grooms,* 128 Ga. App. 333, 196 S.E.2d 459 (1973); *Toole v. Levitt,* 492 S.W. 2d 230 (Tenn. App. 1972); *Wells v. Goforth,* 443 S.W.2d 155 (Mo. 1969); *DeGildo v. Caponi,* 18 Ohio St.2d 125, 247 N.E.2d 732 (1969), and *Moore v. Denune & Pipic, Inc.,* 26 Ohio St.2d 125, 269 N.E.2d 599; *Lunney v. Post,* 248 So.2d 504 (Fla. App.) aff'd 261 So.2d 146 (Fla.).

APPENDIX A.

Opinion of the Court of Appeal.

In the Court of Appeal of the State of California, Second Appellate District, Division Two.

Alfred Beard, by Verdell Beard, his Guardian ad Litem, Plaintiff and Appellant, vs. The Atchison, Topeka and Santa Fe Railway Company, a corporation, Defendant and Respondent. Civil No. 34054.

Filed: February 5, 1970.

APPEAL from judgment of the Superior Court of Los Angeles County. Gerold C. Dunn, Judge. Affirmed in part; reversed in part.

Irving H. Green and Eliot B. Feldman, for Appellant.

John J. Balluff, Matthew H. Witteman, Henry M. Moffat, Neal W. McCrory, John J. Schimmenti, Richard L. Rosett, for Respondent.

Action for personal injuries. Plaintiff Alfred Beard, age 14, attempted to board a moving freight train operated by defendant Santa Fe Railway, fell onto the track, and lost both his legs beneath the wheels. In his first count he pleaded the railroad's negligence; in his second count its violation of the Federal Safety Appliance Act (45 U.S.C., § 11) in maintaining a box car sill step in an unsafe condition. Before trial defendant's motion for summary judgment was granted on the second count because plaintiff was not a person to whom a cause of action had been given by the Safety Appliance Act; at trial defendant's motion for a nonsuit on the first count was granted at the conclusion of plaintiff's case. Plaintiff appeals the judgment in favor of defendant on both counts.

I

On 8 March 1963 in Los Angeles, plaintiff, a student in junior high school, was walking home from school with a group of his friends. As plaintiff and his friends crossed defendant's right-of-way adjacent to Slauson Avenue, a slow-moving (10-15 miles per hour) freight train came along, and two of the friends climbed aboard the train in order to ride it a short distance. After they had gotten on, plaintiff ran alongside the train, grasped the handle bar at the end of a box car, and attempted to pull himself aboard. According to plaintiff, as he placed his feet on the sill step of the box car two and one-half feet above the ground the step wobbled and gave way, and he fell beneath the wheels of the train.

The train passed the point of the accident at the same time every afternoon. The track was straight, and visibility was unobstructed, but a half block away there was a brick wall behind which children could hide from the view of the crew as the front of the train passed by. At the crossing where plaintiff entered the railroad right-of-way and at a point half a block along the track were signs which read: "Atchison, Topeka and Santa Fe Railway Company, Private Property, Keep Out." The train was manned by a crew of five, of whom three (two brakemen and the fireman) were charged with the duty to watch for persons attempting to board the train. At the scene of the accident these three had previously seen children walking near the tracks, hiding and ducking behind the wall, and approaching closely enough to the train to require either warning from the crew or emergency application of the brakes. They had also seen children actually boarding trains at other locations, but they did not know of any boarding or attempts at boarding at the point of the accident. How-

ever, a witness who worked across the street from the scene of the accident, as well as the two boys who boarded the train ahead of plaintiff, testified that at the point of the accident hopping and riding of the train by school children was a common, almost daily, occurrence.

None of the crew was aware of the accident at the time it happened. The conductor had visually inspected the train's safety appliances, including its sill steps, shortly before the run on which the accident occurred. That evening an experienced car inspector checked every step on one side of the train with a flashlight and found no defects. Four other persons also inspected the train that evening.

Plaintiff was of average or slightly-below-average intelligence. He testified he did not realize the dangers involved in hopping rides on moving trains, and said he had never been warned of such dangers by his mother, his friends, or anyone else. Although he had never previously attempted to hop a ride on a train, on several occasions he had seen other boys do so without mishap.

In granting defendant's motion for a nonsuit at the close of plaintiff's case, the trial court concluded that the Safety Appliance Act did not impose absolute liability on the railroad, that the Safety Appliance Act was not intended to benefit trespassing children and therefore its violation could not be used to establish negligence, and that two of the conditions required to impose liability on the railroad on the ground of attractive nuisance had not been met. (Restatement, Second, Torts, § 339 (c) and (d).)[1] The trial court relied on a

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[1]"§ 339. Artificial Conditions Highly Dangerous to Trespassing Children

(This footnote is continued on next page)

series of cases holding that juveniles of plaintiff's age are deemed to have assumed the risks which result from boarding moving freight trains. (*Smith v. Southern Pacific Co.*, 222 Cal.App.2d 728; *Joslin v. Southern Pacific Co.*, 189 Cal.App.2d 382; *Herrera v. Southern Pacific Co.*, 188 Cal.App.2d 441; *Gutirrez v. Southern Pacific Co.*, 174 Cal.App.2d 866.)

Plaintiff argues that the evidence was sufficient to establish liability under any of the following theories: (1) violation of the Safety Appliance Act; (2) attractive nuisance (Restatement, Second, Torts, § 339); (3) concealed trap (*Reynolds v. Willson*, 51 Cal.2d 94, 101-102; (4) constant intruder (Restatement, Second, Torts, §§ 334, 335.) Additionally he argues that the rule adopted in *Rowland v. Christian*, 69 Cal.2d 108, makes a possessor of property liable for negligence to a trespasser whenever the possessor's conduct foreseeably creates an unreasonable risk of harm.

The nonsuit in this case preceded the decision of the Supreme Court in *Rowland v. Christian*, and the trial court on the basis of doctrine as it then stood (Restatement, Second, Torts, § 339) took the view that the burden rested on plaintiff to establish that because of his youth he did not realize and appreciate the risk of boarding a moving freight train. On appeal, however, we must apply the law as it stands today. As the court

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"A possessor of land is subject to liability for physical harm to children trespassing thereon caused by an artificial condition upon the land if . . .

"(c) the children because of their youth do not discover the condition or realize the risk involved in intermeddling with it or in coming within the area made dangerous by it, and

"(d) the utility to the possessor of maintaining the condition and the burden of eliminating the danger are slight as compared with the risk to children involved, . . ."

said in *County of Los Angeles v. Faus*, 48 Cal.2d 672, 680-681: "It is the general rule that a decision of a court of supreme jurisdiction overruling a former decision is retrospective in its operation and that the effect is not that the former decision was bad law but that it never was the law." (*Cf. Carlson v. Ross*, 271 A.C.A. 51.)

II

Because the judgment on the first count resulted from a nonsuit the specific question thereby presented is whether plaintiff satisfied its burden of establishing a prima facie case. The answer to this question is largely shaped by the substantive and procedural changes in the law brought about by *Rowland v. Christian*, 69 Cal.2d 108, which we now consider in terms of its effect on the parties' burden of proof.

Under *Rowland v. Christian*, the liability of a possessor of property to trespassing children is no longer limited by the conditions set out in Restatement, Second, Torts, § 339 (approved in *King v. Lennen*, 53 Cal.2d 340, and in *Smith, Joslin, Herrera*, and *Gutirrez, supra*), or by the terms of other special doctrines and theories created as exceptions to a general rule barring trespassers from recovery for negligence, but is governed by Civil Code, section 1714, which imposes general liability on every person for injuries occasioned to others by want of ordinary care in the management of his property. The status of a claimant at the time of his injury no longer affects the general duty of the possessor of property to exercise ordinary care with respect to reasonable foreseeable risks of personal injury to persons coming on the property. The possessor's duty of ordinary care extends to invitees and trespassers alike, although the foreseeability of injury, and hence

the degree of care required of a possessor, continues to be influenced by the likelihood that persons will be present on the property at a particular time and place, a likelihood normally considerably greater for invitees than for trespassers. (Cf. *Rowland v. Christian,* 69 Cal.2d at 119.) The former gradations of degree in the possessor's duty of care, which varied with the status of persons on the property, have been superseded by a generic duty owed to all persons on the property based on the reasonable foreseeabiity of harm to them. Under *Rowland v. Christian* the extent of a possessor's duty is controlled by the foreseeability of the risk and not by the status of the person injured.

Since a person's status as a trespasser is now largely immaterial and no longer determines that he assumed the risk of personal injuries caused by a possessor's negligence, it follows that the various exceptions to the former rule prohibiting trespassers from recovery for negligence no longer serve their intended purpose. One such exception is that of attractive nuisance, an exception designed to permit children who would otherwise be barred from recovery by their status as trespassers to recover under certain conditions for injuries resulting from a possessor's negligence. A trespassing child could show that as a child he did not realize the risk involved in coming on the property, hence he had not assumed this risk, and therefore he qualified as an exception to the general rule of nonrecovery by trespassers against negligent possessors of property. Under the attractive nuisance exception a trespassing child had the burden of proving his lack of appreciation of the risk involved in coming on the property (i.e. rebutting the presumption that as a trespasser he assumed the risk) and also the burden of proving the feasibility to the

possessor of eliminating the dangerous condition. (Restatement, Second, Torts, § 339; *Joslin v. Southern Pacific Co.*, 189 Cal.App.2d 382, 387.)

But under the new rule proof of trespass no longer creates a presumption that the trespasser took the property as he found it, and a trespassing adult need not rebut the presumption that he assumed the risk of the possessor's negligence in going upon the property. A fortiori, a trespassing child is entitled to the benefit of the same rule. Hence the defense of assumption of risk must be established by defendant in some manner other than mere proof that plaintiff was a trespasser. Defendant can no longer shift the burden on this issue to plaintiff by demonstrating that plaintiff was a trespasser. Since the burden of proving assumption of risk remains on defendant throughout, it follows that a trespassing child no longer need prove his realization of the risk in order to rebut the presumption that he assumed it.

Consequently, while plaintiff has the burden of proving defendant's negligence, and defendant has the burden of proving plaintiff's contributory negligence, both as before, defendant now has the burden of proving assumption of the risk—for trespasser and invitee alike. (*Inouye v. Pac. Gas & Elec. Co.*, 53 Cal.2d 361, 367-368.) With this critical change in the burden of proof in mind we briefly take up the main issues in the case.

To establish the railroad's negligence plaintiff relied on two factors. First, the railroad knew, or should have known, that children regularly hopped rides at this particular location on this particular train and negligently failed to take action to prevent such activity, either by maintaining a better lookout on the train or

a stricter police of its right-of-way. Essentially, this factor was premised on the failure of the railroad to provide an adequate and effective warning system for those who it could anticipate might need it. Second, plaintiff charged the railroad with negligence in maintaining a loose sill step on a box car, which caused plaintiff to fall from the box car beneath the wheels of the train. Clearly, this second factor charged the maintenance of railroad property in a dangerous and defective condition in violation of a safety statute, a violation which, if true, would furnish some evidence of the railroad's negligece. (*Alarid v. Vanier*, 50 Cal. 2d 617; cf. Ev.Code, § 669.) Either factor, if given credence, might be sufficient to support plaintiff's claim that defendant had been negligent, for both involved a reasonably foreseeable risk of harm to others arising out of a want of ordinary care in the management of defendant's property. The contemporary test of negligence has been stated in *Dillon v. Legg*, 68 Cal.2d 728, at 740: "Since the chief element in determining whether defendant owes a duty or an obligation to plaintiff is the foreseeability of risk, that factor will be of prime concern in every case. Because it is inherently intertwined with foreseeability such duty or obligation must necessarily be adjudicated only upon a case-to-case basis." Judged by this standard each of the two factors relied on by plaintiff could qualify as proof of actionable negligence under section 1714. (*Taylor v. Centennial Bowl, Inc.*, 65 Cal.2d 114, 121; *Laird v. T. W. Mather, Inc.*, 51 Cal.2d 210, 216.)

On the issue of assumption of risk the burden of proof rests on defendant to establish by a preponderance of the evidence (1) plaintiff's conscious assumption of the risk, which in the case of a juvenile en-

compasses his capacity to realize and appreciate the risk, and (2) the risk which plaintiff assumed was the one which proximately caused his injury. (*Vierra v. Fifth Avenue Rental Service,* 60 Cal.2d 266, 271.) On the subject of realization and appreciation of the risks involved in boarding a moving freight train plaintiff testified he did not know, and had never been told, that hopping a ride on a moving freight train was dangerous. This testimony was sufficient to present a question of fact on the issue of assumption of risk. While it is doubtful that a trier of fact would believe that plaintiff at the age of 14 did not know and had never been told about the danger involved in boarding a moving freight train, plaintiff made such a claim, and the burden fell on defendant to refute it in order to sustain its burden of proof with respect to plaintiff's realization and appreciation of the risk. The case is distinguishable from *Smith, Joslin, Herrera,* and *Gutirrez, supra,* in that in those cases the claimant either admitted knowledge of the danger of hopping moving freight trains or failed to aver his ignorance of the subject.

The particular risk assumed also presents a question of fact. Plaintiff avers the specific cause of his injury was a loose box car sill step, which, he contends, amounted to a risk he did not consciously assume. If the jury should find the existence of a loose sill step and a causal relationship between the defective step and plaintiff's injury, it might conclude that plaintiff had not assumed the particular risk which caused his injury. Since one cannot assume a risk of which one is unaware, a question of fact was presented whether plaintiff was aware of the particular risk which in fact materialized. (*Vierra v. Fifth Avenue Rental Service,*

60 Cal.2d 266, 271; *Crain v. Sestak*, 262 Cal.App.2d 478, 488.) In *Bee v. Tungstar Corp.*, 65 Cal.App.2d 729, 733, an invitee who knew of the general danger in riding a bucket in the mine owners' aerial tramway did not know of the specific danger of an improperly spliced traction cable used to pull the bucket. The court found plaintiff had not assumed that particular risk, stating: "One who assumes the risks of dangers ordinarily incident to the use of an instrumentality does not assume the risk of danger created by the negligence of others in maintaining or operating the instrumentality. (*Gornstein v. Priver*, 64 Cal.App. 249, 258.) Decedent had no knowledge or means of knowledge that the cable had been improperly spliced and did not assume the risk of negligence on the part of defendant's superintendent in splicing the cable."

On the issue of plaintiff's contributory negligence the burden of proof, now, as before, lies on defendant. The rules on contributory negligence outlined in Restatement, Second, Torts, are applicable, and to establish the defense the defendant must show that plaintiff's conduct fell below the standard of care required of him in the light of his age, intelligence, and experience, and that as a consequence of this plaintiff was injured.[2] Had plaintiff's evidence showed contributory

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[2]Restatement, Second, Torts:
Section 463: "Contributory negligence is conduct on part of the plaintiff which falls below the standard to which he should conform for his own protection, and which is a legally contributing cause co-operating with the negligence of the defendant in bringing about the plaintiff's harm."
Section 464(2): "The standard of conduct to which a child must conform for his own protection is that of a reasonable person of like age, intelligence, and experience under like circumstances."
Section 468: "The fact that plaintiff has failed to exercise reasonable care for his own safety does not bar his recovery unless his harm results from one of the hazards which make his conduct negligent."

negligence as a matter of law the trial court's nonsuit would have been correct. (*Struder v. Southern Pacific Co.*, 121 Cal. 400, 404.) However, it failed to do this in two respects comparable to those discussed on assumption of risk. First, whether plaintiff acted negligently in attempting to board a moving freight train depended on his age, intelligence, and familiarity with the dangers inherent in moving trains. We think the dangers connected with moving trains, like those connected with runaway horses and wild animals, may be less generally understood by juveniles today than they were seventy years ago when the railroad was king of transportation and dominated all youthful imaginations. Furthermore, the higher standard of protection against danger prevalent in modern industrial society has to some extent lulled adult and juvenile alike into an expectation of protection against danger under all circumstances and perhaps blunted our awareness of the need on occasion to look out for ourselves. In view of the substantial role which awareness of the surroundings plays in determining what conduct is negligent, an awareness which is dynamic and not static, and which over the years gradually changes its aim, focus, and intensity, we think conduct which would be negligent as a matter of law in the railroad age may no longer be so in the space age—and vice versa—and precedents formulated in earlier times under different social conditions may no longer be persuasive or controlling. (e.g. *Baltimore & Ohio Rd. v. Goodman*, 275 U.S. 66, the Holmes stop-look-and-listen rule of contributory negligence.) The principle of stare decisis is never absolute, and the precedents of one generation which appear unreasonable to the next may not always be followed. (Prosser, Law of Torts, 3rd ed., p. 209.) For these

reasons we do not deem controlling the precedent of *Studer v. Southern Pacific, supra,* and we conclude that the issue of plaintiff's conduct presented a question of fact to be determined by the trier of fact in the light of the conditions of the times. (*Dickeson v. Baltimore & Ohio Chicago Terminal RR Co.*, 245 N.E.2d 762, 764-765 [S.Ct.Ill. 1969]; *Hawk v. City of Newport Beach,* 46 Cal.2d 213, 218; *Cahill v. Stone & Co.*, 153 Cal. 571, 577; *Ridge v. Boulder Creek etc. School District,* 60 Cal.App.2d 453, 459-460.)

Second, on contributory negligence, while a 14-year-old's conduct in boarding a moving freight train may amount to negligence as a matter of law with respect to certain hazards, such as slipping and stumbling, it does not necessarily do so with respect to all conceivable hazards. Plaintiff's negligence bars recovery only when the hazard which caused his injury is the specific hazard with respect to which he has been negligent. (Restatement, Second, Torts, § 468; Prosser, Law of Torts, 3rd ed., pp. 431-432; Harper and James, Torts, p. 1230; *Furukawa v. Yoshio Ogawa,* 236 F.2d 272 [9th Cir. 1956].) This relationship between negligence and injury is essentially one of cause and effect. (*Farole v. Eichman,* 39 Cal.2d 822, 825; *Espinoza v. Rossini,* 247 Cal.App.2d 40, 49.) In considering this aspect of contributory negligence we must assume it was perfectly safe to hop a ride on a moving train except for the particular hazard which in fact caused the accident (here, the hazard of a defective sill step). So considered plaintiff's negligence in jumping on the moving train would not necessarily bar his recovery.

One final aspect of contributory negligence. Defendant argues that plaintiff violated a statute which makes it a penal offense to trespass on a railroad train (Pen.

Code, § 587(b)), and because of this violation plaintiff's conduct must be deemed negligent as a matter of law. Undoubtedly proof of plaintiff's violation of the statute furnishes some evidence that plaintiff's conduct was negligent. Such evidence, however, does not conclusively prove negligence but merely establishes a rebuttable presumption that plaintiff failed to exercise due care. (*Nevis v. Pacific Gas & Elec. Co.*, 43 Cal.2d 626, 633; cf. Ev.Code, § 669.) The rule is similar to that applied to a defendant's violation of a statute, which creates a rebuttable, but not conclusive, presumption that defendant was negligent. (*Alarid v. Vanier*, 50 Cal.2d 617; cf. Ev.Code, § 669.) Consequently, proof of plaintiff's violation of the statute prohibiting trespass on a railroad train does not justify a finding of contributory negligence as a matter of law.

To sum up on contributory negligence, it was for the jury to decide whether plaintiff in the light of his age, intelligence, and experience was negligent in hopping the train, what specific hazards he was negligent with respect to, and what hazards materialized in fact to cause his injuries.

Since a prima facie case of the railroad's negligence was presented and since plaintiff's assumption of risk and plaintiff's contributory negligence were both affirmative defenses of fact which the railroad was required to prove by a preponderance of the evidence, we conclude that the entry of the nonsuit on the first cause of action was erroneous.

III

The second cause of action sought to impose absolute liability on the railroad because of its asserted violation of the Safety Appliance Act. This count was properly dismissed if plaintiff was not one of the class of persons to whom that Act gave a cause of action. The Act itself speaks in terms of railroad liability for the death or injury of railroad employees. (45 U.S.C., § 13.) Its inapplicability to a nonemployee has been recently reaffirmed by the United States Supreme Court in *Crane v. Cedar Rapids & I.C.R. Co.*, 395 U.S. 164, 165:

"The Safety Appliance Act did not create a federal cause of action for either employees or nonemployees seeking damages for injuries resulting from a railroad's violation of the Act. (*Moore v. Chesapeake & Ohio R. Co.*, 291 U.S. 205 (1934).) Congress did, however, subsequently provide a cause of action for employees: The cause of action created by the Federal Employers' Liability Act of 1908, 35 Stat. 65, as amended, 45 U.S.C. § 51 et seq., embraces claims of an employee based on violations of the Safety Appliance Act. In such actions, the injured employee is required to prove only the statutory violation and thus is relieved of the burden of proving negligence (*O'Donnell v. Elgin, J. & E.R. Co.*, 338 U.S. 384 (1949); *Coray v. Southern Pac.R.Co.*, 335 U.S. 520 (1949); *Affolder v. New York, C. & St. L.R. Co.*, 339 U.S. 96 (1950).) He is not required to prove common law proximate causation but only that his injury resulted 'in whole or in part' from the railroad's violation of the Act (45 U.S.C. § 51); *Rogers v. Missouri Pac.R.Co.*, 352 U.S. 500 (1957)), and the railroad is deprived of the de-

fenses of contributory negligence and assumption of risk (45 U.S.C. §§ 53, 54).

"In contrast, the nonemployee must look for his remedy to a common-law action in tort, which is to say that he must sue in a state court, in the absence of diversity, to implement a state cause of action." (See also, *Jacobson v. New York, N.H. & H.R. Co.*, 206 F. 2d 153, affirmed 347 U.S. 909 (Safety Appliance Act held inapplicable to passenger).)

In California violation of a statute does not impose strict or absolute tort liability on the violator but merely creates a rebuttable presumption of negligence, a presumption which may be overcome by evidence of justification or excuse. (*Alarid v. Vanier*, 50 Cal.2d 617; *Maloney v. Rath*, 69 Cal.2d 442; cf. Ev.Code, § 669.) Therefore, while proof of a defective sill step would show that the Safety Appliance Act had been violated, the violation itself would not be conclusive proof of defendant's negligence in relation to plaintiff, nor would it impose strict or absolute liability on the defendant, nor would it abrogate the defenses of contributory negligence and assumption of risk. Patently, the second cause of action did no more than duplicate the charge of negligence set out in the first count. The trial court, therefore, acted properly in granting defendant's motion for summary judgment on the second cause of action.

The judgment for defendant is reversed on the first count and affirmed on the second count. Plaintiff to recover costs.

Fleming, *J.*

We concur:

Roth, *P. J.*

Wright, *J.*

APPENDIX B.

California Rules of Court, Rule 977.

Rule 977. Citation of Unpublished Opinions Prohibited; Exceptions

An opinion of a Court of Appeal or of an appellate department of a superior court that is not published in the Official Reports* shall not be cited by a court or by a party in any other action or proceeding except when the opinion is relevant under the doctrines of the law of the case, res judicata or collateral estoppel, or in a criminal action or proceeding involving the same defendant or a disciplinary action or proceeding involving the same respondent. (1-1-74).

*This rule shall not apply to an opinion certified for publication prior to its actual publication.